NO. 21659

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM HENRY GRIMES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Codes

Rules

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I

JURISDICTION

The Federal Grand Jury returned indictment No. 34469 on January 13, 1965, charging appellant and Albert David O'Day with a violation of Title 18, United States Code, Sections 3 and 2113(a). Appellant was convicted on February 10, 1965 before the United States District Court for the Southern District of California, the Honorable Charles C. Carr presiding, upon a jury verdict of guilty on Counts III and IV. No appeal from this conviction was taken. Appellant filed a Motion to Vacate Judgment of Conviction No. 66-1425-CC, on September 1, 1966, [C. T. 2][1/] which was

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1/ "C. T." refers to Clerk's Transcript.

denied by the court without a hearing on December 10, 1966 [C. T. 31]. Timely Notice of Appeal was filed by appellant on January 12, 1967 [C. T. 49]. Leave to appeal in forma pauperis was granted on March 24, 1967.

The District Court had jurisdiction of the motion pursuant to Title 28, United States Code, Section 2255. This court has jurisdiction on this appeal pursuant to Title 28, United States Code, Sections 2253, 1915, 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 3:

"Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; . . . ."

Title 18, United States Code, Section 2113(a):

"Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny --

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

Title 28, United States Code, Section 144:

"Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is

pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

III

STATEMENT OF FACTS

The following is taken from the trial memorandum of the government in Case No. 34469 since no transcript has been prepared and the appellant's brief does not contain such a statement. Appellant was a delivery truck driver for the Essex House of Furniture in December, 1964. Albert David O'Day was his assistant. On December 17, 1964, Grimes drove the truck into the parking lot behind the Bank of America's Panorama City Branch. O'Day entered the bank, presented a demand note, and robbed a teller of approximately $730.00. He ran out of the bank toward

the truck. As he approached, Grimes told him a witness had seen him and instructed O'Day to keep running. Grimes then drove away and picked up O'Day a few blocks from the bank. O'Day and Grimes split the proceeds of the robbery.

On December 23, 1964, O'Day and Grimes drove to the Sherman Oaks Branch, Bank of America. O'Day entered the bank by the back door, and Grimes by the front door. Again using a demand note, O'Day robbed a teller of approximately $1,676.00. O'Day and Grimes then fled the bank.

IV

QUESTIONS PRESENTED

1. Did the court err in determining that the Affidavit of Bias was legally insufficient to establish personal bias and prejudice?
2. Is the admissibility of a confession a ground upon which to collaterally attack a conviction under Section 2255? If so, was it error to admit defendant's confession?
3. Was it error to determine that appellant's moving papers were legally insufficient to require an evidentiary hearing, when the ground asserted was knowing use of perjured testimony by the prosecution?
4. May appellant raise the issue of frustration of

his right to appeal for the first time in this court?

If so, does the record support his contention?

V

ARGUMENT

A. APPELLANT'S AFFIDAVIT OF BIAS WAS LEGALLY INSUFFICIENT TO ESTABLISH PERSONAL BIAS AND PREJUDICE OF THE TRIAL JUDGE.

The affidavit filed by the appellant in the lower court [C. T. 11-12] alleged no facts from which a reasonable mind might fairly infer bias or prejudice and was therefore legally insufficient to establish personal bias or prejudice.

Lyon v. United States, 325 F. 2d 370 (9th Cir. 1963);

Willenbring v. United States, 306 F. 2d 944 (9th Cir. 1962);

Price v. Johnston, 125 F. 2d 806 (9th Cir. 1942).

Notwithstanding appellant's contention, it is fundamental that the trial judge must first determine the sufficiency of the affidavit of bias and prejudice before a determination as to the truth of the allegations is made.

Berger v. United States, 255 U. S. 22 (1921);

Craven v. United States, 22 F. 2d 605 (1st Cir., 1927).

"The provision in the statute [requiring

facts and reasons] is meaningless, unless construed to require the plaintiff, under oath, at least to assert facts from which a sane and reasonable mind may fairly infer bias or prejudice."

Keown v. Hughes, 265 Fed. 573, 577 (1st Cir. 1920);

Accord: Scott v. Beams, 122 F. 2d 777 (10th Cir. 1941).

The affidavit filed by petitioner contains no factual allegations of sufficient particularity from which one might reasonably infer bias or prejudice of the trial judge. It merely alleges that the trial judge is prejudiced against bank robbers and Negroes, including the petitioner. [C. T. 11-12]. The affidavit is insufficient and the court did not err in refusing to transfer the case.

B. ADMISSIBILITY OF A CONFESSION CANNOT BE ASSERTED AS A GROUND FOR COLLATERAL ATTACK ON A CONVICTION.

Section 2255 of Title 28, United States Code cannot take the place of an appeal. It may not be the vehicle for relitigating questions which were or should have been raised on direct appeal.

Thornton v. United States, 368 F. 2d 822 (D. C. Cir. 1966);

United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965);

Black v. United States, 269 F. 2d 38 (9th Cir. 1959), cert. denied, 361 U. S. 938 (1959)

This principle was succinctly stated in Hodges v. United States, 282 F. 2d 858 (D. C. Cir. 1960), cert. dismissed, 368 U. S. 139 (1961).

> "Absent a showing of a real miscarriage of justice, I think we must hold to the general rule that the admission of a confession at a plenary trial is not subject to attack under Section 2255 on the ground that the confession was coerced, or was given during a period of illegal detention. Allowing such collateral attacks to be made would permit the reopening of many of the most hotly contested criminal trials -- at a time when recollections may have dimmed and witnesses may have disappeared." 282 F. 2d at 860.

Accord: Campbell v. United States, 355 F. 2d 394 (7th Cir. 1966), cert. denied, 385 U. S. 922 (1966); Smith v. United States, 187 F. 2d 192, 197 (D. C. Cir. 1950), cert. denied, 341 U. S. 927 (1951).

Moreover, relief under Section 2255 will be denied where there was a knowing or calculated decision not to appeal. Fay v. Noia, 372 U. S. 391 (1963); Sunal v. Large, 332 U. S. 174 (1947). The transcript discloses that petitioner and his appointed counsel

chose not to appeal, but to move for a modification of sentence under Rule 35, Federal Rules of Criminal Procedure. [C. T. 38].

C. PETITIONER'S CONFESSION WAS VOLUNTARILY GIVEN AND THEREFORE PROPERLY ADMITTED INTO EVIDENCE

The issue of voluntariness was first considered by the court outside the presence of the jury [C. T. 32]. It was then submitted to the jury under careful instructions. [C. T. 32].

Absent a strong factual showing by petitioner from the record that the confession was the end product of coercion or coercive influences, see Davis v. North Carolina, 384 U. S. 737 (1966), this court will not interfere with the determination by the lower court and the jury. See Diaz-Rosendo v. United States, 357 F. 2d 124 (9th Cir. 1966). Petitioner has never alleged facts to support his contention; his motion for relief merely stated the conclusion that the confession was involuntary. [C. T. 4]. Clearly, no evidentiary hearing was necessary based upon this bald assertion, particularly in view of the complete hearing afforded to petitioner on this issue at the trial. Dodd v. United States, 321 F. 2d 240 (9th Cir. 1963). Furthermore, petitioner was given the opportunity to amend his petition and file additional affidavits with the lower court, but refused to do so. [C. T. 36-37].

Additionally, petitioner apparently contends that his con-

fession was inadmissible as a matter of law, because it was given in the absence of counsel. A voluntary confession made without counsel is not inadmissible in every case. United States v. Robinson, 354 F. 2d 109 (2nd Cir. 1965); Mitchell v. Stephens, 353 F. 2d 129, 141 (8th Cir. 1965). Since petitioner does not allege, nor does the record reflect, that he requested and was denied counsel prior to questioning, Escobedo v. Illinois, 378 U. S. 478 (1964), is inapposite. See Von Schmitt v. United States, 366 F. 2d 773 (9th Cir. 1966).

D. WAS IT REVERSIBLE ERROR TO DETERMINE THAT THE PETITION WAS LEGALLY INSUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING ON THE ISSUE OF KNOWING USE OF PERJURED TESTIMONY?

The trial court considered the affidavits submitted by petitioner [C. T. 8, 9] and the Assistant United States Attorney [C. T. 24-25], and concluded that an evidentiary hearing was unnecessary. [C. T. 36]. Since petitioner's showing consisted of only vague and conclusionary assertions, which failed to particularize the claimed perjured testimony, or its materiality, the petition was legally insufficient.

Marcella v. United States, 344 F. 2d 876 (9th Cir. 1965), cert. denied, 382 U. S. 1016 (1965);

Holt v. United States, 303 F. 2d 791 (8th Cir. 1962);

United States v. Jenkins, 281 F. 2d 193 (3rd Cir. 1960).

The court in Marcella, supra, delineated the necessary facts that a petitioner must show in order to vacate a sentence on this ground:

> "[T]he movant must show that the testimony was perjured and that the prosecuting officials knew at the time such testimony was used that it was perjured. ... In addition, the perjured testimony said to have been knowingly used must be particularized definitely." 344 F. 2d at 880

The facts upon which petitioner grounds this contention are contained in the affidavit of Albert David O'Day. [C. T. 8-9]. O'Day failed to particularize the perjured testimony. He merely states that he "added a little yeast" to his testimony that that he "thinks" the Assistant United States Attorney knew he was not telling the truth. [C. T. 9] These vague and conclusionary assertions are patently insufficient under the test set forth in Marcella.

The Assistant United States Attorney, Kevin O'Connell, submitted an affidavit which denies that he made any promises of immunity or threats to O'Day, and states that at no time did he believe O'Day's testimony to be perjurious. [C. T. 24-25].

Petitioner was allowed 60 days in which to amend his petition to set forth specifically the alleged perjurious testimony and to file additional affidavits. [C. T. 36-37]. He failed to avail himself of the opportunity.

In Machibroda v. United States, 368 U. S. 487 (1961), the

court held that it was error to decide petitioner's motion under Section 2255, which alleged facts to show that his guilty plea was coerced, without an evidentiary hearing. The court added, however:

> "What has been said is not to imply that a movant must always be allowed to appear in the district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be. The language of the statute does not strip the district courts of all discretion to exercise their common sense."
> 368 U. S. at 495.

This court has indicated that under the statute the trial court may deny a motion for relief under Section 2255 without granting an evidentiary hearing, even though the facts cannot be conclusively determined from the record. That situation was before this court in Dodd v. United States, 321 F. 2d 240 (9th Cir. 1963), where defendant alleged ineffective assistance of counsel and knowing use of perjured testimony by the prosecution. The court said that defendant's bald legal conclusions with no supporting allegations of fact were insufficient. The trial court had the power to deny the motion as to these grounds without an evidentiary hearing.

In considering the propriety of denying such a motion without

a hearing, Judge Prettyman wrote:

> "A motion which shows no ground for granting it conclusively shows it will be denied; conclusively shows no relief will be granted. . . . If such a movant proved all the facts he alleges, he would get no relief; . . ."
>
> Mitchell v. United States, 249 F. 2d 787, 794 (D. C. Cir. 1958), cert. denied, 358 U. S. 850 (1958). [Emphasis added]

Reviewing the allegations of appellant's moving papers in the court below, it becomes apparent that he has not alleged facts that would entitle him to relief. O'Day alleges promised immunity which was admittedly never received. It further alleges that he "added a little yeast" to his testimony and that he "thinks" the Assistant United States Attorney knew that his testimony wasn't entirely true. The vagueness of "adding a little yeast" is self-evident, so too is the vague and conclusory nature of the alleged knowledge on the part of the Assistant United States Attorney.

Under these circumstances, a hearing would be a useless waste of time and money. Moreover, serious consequences to the administration of law would follow if the entire prison population could demand a second trial by the simple expedient of alleging vague, conclusory, and palpably incredible grounds for relief which cannot be conclusively determined from the records and files of the case. See Young Hee Chong v. United States,

344 F. 2d 126 (9th Cir. 1965); Malone v. United States, 299 F. 2d 254 (6th Cir. 1962); United States v. McNicholas, 298 F. 2d 914 (4th Cir. 1962), cert. denied, 369 U. S. 878 (1962); Mitchell v. United States, supra.

E. APPELLANT MAY NOT RAISE ERRONEOUS FRUSTRATION OF THE RIGHT TO APPEAL FOR THE FIRST TIME IN THIS COURT.

Appellant having failed to raise the alleged frustration of his right to appeal in the lower court cannot be heard to raise that issue on this appeal. Smith v. United States, 287 F. 2d 270, 273 (9th Cir. 1961), cert. denied, 366 U. S. 946 (1960); Johnston v. United States, 254 F. 2d 239, 241 (8th Cir. 1958). An appellate court need not consider contentions on appeal which were not presented in the trial court. Holt v. United States, 303 F. 2d 791 (8th Cir. 1962).

This court has held repeatedly that a defendant for the first time on appeal from denial of a motion to vacate a conviction cannot raise issues that were not presented to the trial court.

E. g., Rivera v. United States, 318 F. 2d 606, 608 n. 4 (9th Cir. 1963).

Appellant's motion to the district court does not advert to this issue as a ground for relief [C. T. 3]; hence, he cannot raise the issue in this court.

F. ASSUMING APPELLANT IS ALLOWED TO RAISE THE ISSUE AS TO THE FRUSTRATION OF HIS RIGHT TO APPEAL, THE CONTENTION IS WITHOUT MERIT

It is settled that relief under Section 2255 will be denied where there was a knowing or calculated decision not to appeal.

Fay v. Noia, 372 U.S. 391 (1963);

Sunal v. Large, 332 U.S. 174 (1947);

Dodd v. United States, 321 F. 2d 240, 244-6 (9th Cir. 1963).

The record indicates that appellant was represented by counsel at arraignment and plea, trial, sentencing, and on a motion for modification of sentence. [C. T. 6]. It does not therefore support appellant's contention that he was unaware of his right to appeal; consequently, the lower court was without jurisdiction to grant appellant's motion for leave to file a notice of appeal nunc pro tunc, which was filed almost two years after entry of the judgment.

Robinson v. United States, 361 U.S. 220 (1960);

United States v. Creighton, 359 F. 2d 429 (3rd Cir. 1966);

People v. United States, 337 F. 2d 91 (10th Cir. 1964), cert. denied, 381 U.S. 916 (1964).

Rule 32(a)(2) of the Federal Rules of Criminal Procedure does not apply to appellant since that rule did not exist at the time of his sentencing. It became effective July 1, 1966; appellant

was sentenced on February 10, 1965.

Fed. Rules Cr. Proc. Supp., Rule 32, 18 U. S. C. A.

Former Rule 37(a)(2) required the court at sentencing to inform a defendant not represented by counsel of his right to appeal.

Fed. Rules Cr. Proc., Rule 37(a)(2), 18 U. S. C. A.

Some of the cases cited by appellant at page 13 of his brief set forth the rule that a defendant who is unaware of his right to appeal may assert in a collateral attack on his conviction the failure of the court of his attorney to thus inform him.

E. g., Doyle v. United States, 336 F. 2d 640 (9th Cir. 1964); Hannigan v. United States, 341 F. 2d 587 (10th Cir. 1965).

Here, however, appellant was represented by counsel during the ten-day period within which he could have filed an appeal, and throughout the proceedings in the trial court. Appellant admits that his attorney thought the best tack was to move for a modification of sentence rather than appeal. [C. T. 39]. Following his attorney's advice, appellant chose not to appeal but to seek a modification of his sentence. Appellant cannot now contend that he was unaware of his right to appeal.

VI

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen
CRAIG B. JORGENSEN